Supreme Court, U.S.
FILED
OCT 23 2000
CLERK

(4)

No. 00-454

In the

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ROBERTA BUGENIG, JAMES D. THOMPSON, JULIA R. THOMPSON, AND THE CUSTER BATTLEFIELD TRADING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

20PP

QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between two nonIndians on fee land within the reservation?

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INTEREST OF AMICI[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property. In recent years, the Foundation has become increasingly concerned over the scope of regulatory and taxing authority asserted by Indian tribes over nonIndian-owned fee property located within the exterior boundaries of Indian reservations.

In this regard, Foundation attorneys are representing Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, Montana District Court No. 98-110, a case now pending before the Ninth Circuit Court of Appeals. In *Thompson*, the Montana Federal District Court held that the Crow Indian Tribe could not impose a 4% "resort tax" on all gross receipts on a nonIndian business located on nonIndian fee land within the exterior boundaries of the Crow Indian Reservation.

Foundation attorneys are also representing Amicus Mrs. Roberta Bugenig, in the case of *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 U.S. App. LEXIS 24746 (9th Cir. Oct. 3, 2000), a case where the Ninth Circuit found that the Hoopa Valley Indian Tribe lacks regulatory jurisdiction over timber harvesting activity on Mrs. Bugenig's fee property.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation, Roberta Bugenig, James D. and Julia R. Thompson, and the Custer Battlefield Trading Company affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The decision in the case that is subject to the pending petition for writ of certiorari, *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), implicates issues similar to those that the courts addressed in the *Thompson* and *Bugenig* cases. For that reason, these Amici have an interest in seeing that the Court addresses the reasoning in *Atkinson* in order to ensure uniformity of decisionmaking in the circuit courts of appeals.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The issue of when an Indian tribe may extend its regulatory and taxing jurisdiction over nonIndian-owned fee property continues to vex the lower courts despite numerous opinions from this Court. The decision below is the most recent manifestation of the difficulties that the courts have had in setting limits upon tribal jurisdiction over nonIndian-owned fee land. Despite this Court's admonitions in cases from *Montana v. United States*, 450 U.S. 544 (1981), to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the lower courts have sometimes strayed, most notably in the decision below when the Tenth Circuit extended taxing authority over nonIndian-owned fee simple property. While the circuit below upheld a tax upon transactions taking place on nonIndian owned fee property, the Ninth Circuit and its district courts have rejected similar assertions of taxing authority. Similarly, the reasoning of the Ninth Circuit on other matters of regulatory jurisdiction show how different circuits are approaching these cases in ways that suggest further guidance from this Court is appropriate.

I

THE EXTENT OF NONINDIAN PRESENCE AND LAND ON INDIAN RESERVATIONS GIVES GREAT PRACTICAL IMPORT TO THE QUESTION PRESENTED

The seemingly narrow circumstances of this case—taxing nonIndian travelers on a state highway for lodging the night on nonIndian fee simple property—may mask the practical import of the doctrinal question presented. In fact, the potential quantum of inappropriate tribal regulation and taxation of nonIndians on nonIndian land is very great. The presumptive rule against tribal authority over nonIndian fee simple land is a quantitatively and historically important limitation on such unfairness. Accordingly, the Amici wish to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties," Rule 37.1, specifically the extent of nonIndian population and fee simple land and equivalent land on Indian reservations and the increasing focus of tribal taxes on nonIndians.

As last revised by the Bureau of Indian Affairs Geographic Data Service Center in 1998, there are approximately 1,135,874,716 acres of Indian trust land in the United States located on 314 reservations. BIA Geographic Data Service Center, *Judicially Established Indian Land Areas 1978* (1998). They range from extensive tracts larger than some states to parcels of only a few acres. They are found in rural, suburban, and even urban areas.

As of the 1990 census there were 1,878,285 American Indians. Edna L. Paisano, U.S. Census Bureau, *The American Indian, Eskimo, and Aleut Population* 1 (2000) (last modified Jan. 29, 1999) <http://www.census.gov/population/www/pop-profile/amerind.html>. In 1999, that population was estimated at 2.4 million. *Population Growth Rate Remains Stable, Census Bureau Reports*, United States Department of

Commerce News, June 4, 1999, at 1, <http://www.census.gov/Press-Release/www/1999/cb99-101.html>. Only 22.3% of American Indians live on reservations. Bureau of the Census, U.S. Department of Commerce, *We the . . . First Americans* 7 (1993). Significantly, of the 808,070 people living on Indian reservations, 370,543, or 45.8%, are nonIndians. Bureau of the Census, U.S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990).

Data are not available from the Bureau of Indian Affairs or elsewhere on the precise amount of nonIndian fee land on Indian reservations. However, the Nineteenth Century policy of allotment, first by special statutes and then universally by the General Allotment Act of 1887, resulted in much land on many reservations passing into fee title and entering the stream of commerce. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 130-35 (1982 ed.).

Federally granted easements and rights-of-way on reservation land, often to nonIndians, have historically promoted development of Indian lands as well as the needs of Indians and nonIndians alike for transportation and other access. Such rights-of-way lead to the most casual and frequent presence of nonIndians on Indian reservations, the kind found in this case—travelers on state and federal highways who cross Indian lands merely in getting from one place to another.

The most permanent nonIndian presence and the strongest expectation of autonomy from tribal control and taxation on the reservation comes from owning land in fee simple or its equivalent. Federal grants of easements and rights-of-way are also the modern mechanism for giving secure titles equivalent to fee simple for major capital investments on the reservation.

The federal policy of inducing investment for the mutual benefit of Indians and nonIndians on easements and rights-of-way was codified in 1948 in 25 U.S.C. § 323, *et seq*. That

statute is a general authorization of such federal grants in lieu of the earlier practices of special laws and narrower statutes allowing such grants for more limited purposes or for specific reservations. Cohen, *supra*, at 543-44.

Thus, tribal regulation and taxation of nonIndians potentially affects hundreds of thousands of people living on reservations and innumerable other nonIndians.

II

TRIBAL TAXATION IS AIMED MOSTLY AT NONINDIANS

From the beginning of the Republic, it has been federal policy to protect the cultural and political autonomy of Indians who maintain their tribal relations. The most important tool of that policy has been the tribal power of self-government. Cohen, *supra*, at 660-63. It is in the nature of tribal self-government that only members of the tribe participate in that government. *See id.* at 662.

It is no surprise that in the resurgence of tribal taxation in the last two decades, tribes have sought largely to tax nonIndians, to whom tribal governments need not answer. A prominent commentator on Indian law has recently concluded:

> Some of the tribes have imposed taxes on business activity within Indian country, and those taxes have fallen largely upon non-Indian enterprises. . . .
>
> There has recently been a sharp increase in tribal taxes on non-Indian businesses, arising from a new awareness of the governmental powers of the tribes, along with heightened revenue needs. In some cases there is also a conviction that non-Indian enterprises have been granted leases or licenses that are unduly advantageous to them and

> disadvantageous to the tribes. Taxation is seen as one means of recouping the loss.

William C. Canby, Jr., *American Indian Law in a Nutshell* 261 (3d ed. 1998).

We know from the experience of parallel governments in our federal system that taxation of outsiders rather than insiders is primordial human behavior. In the interstate context, the Constitution itself consciously curbs that behavior through the Commerce Clause, the Privileges and Immunities Clauses, the Equal Protection Clause, and the Due Process Clauses. However, those constitutional limitations are usually found inapplicable to Indian tribes. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Therefore, in the absence of statutes, the federal common law of Indian relations must strike the right balance between tribal self-government, our democratic commitment to consent of the governed, and the civil rights interests of persons who are excluded by the immutable circumstances of their birth from a voice in a government that would take part of their freedom and property.

De facto and even de jure discrimination against nonmembers in tribal taxation is receiving the attention of lower courts. As shown in section III B below, the treatment by the lower courts has been inconsistent and requires the attention of this Court on broad doctrinal grounds. The first protection against such inappropriate taxation has been the recognition that nonIndian fee land is presumptively not subject to tribal regulatory jurisdiction or taxation. Whether that historic rule should be abandoned, as the Tenth Circuit now holds, or maintained, as the Ninth Circuit holds, merits the consideration of this Court.

III

THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT AS WELL AS THE NINTH CIRCUIT COURT OF APPEALS

A. There Is a Presumption That NonIndian-Owned Fee Lands Are Subject to State and Local, Not Tribal, Regulatory and Taxation Jurisdiction; the Tenth Circuit's Ruling Is in Conflict with This Presumption

This Court has established a presumption that tribal governments do not have jurisdiction over fee property belonging to nonmembers. The origins of this presumption can be traced to the history, nature, and status of the fee simple property. However, the Tenth Circuit rejected the force of this Court's pronouncements on the nature of this presumption when it held that the status of the land as fee simple is not particularly important in determining the existence of tribal jurisdiction. *See* decision of Tenth Circuit, reproduced in Petitioner's Appendix (PA) at, e.g., 25a ("Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the Montana standard.").

It is undisputed that the fee land that is now owned by the Atkinson Trading Company is fee simple property. *See* PA at 2a. Within the boundaries of Indian reservations throughout the United States there are numerous similarly situated fee simple properties belonging to nonIndians, most of which first became private property as a result of the General Allotment Act of 1887, 24 Stat. 390 (current version at 25 U.S.C. § 331, *et seq.*). Significantly, there is a general presumption that such nonIndian-owned fee simple land created through the allotment acts is subject to state, not tribal, jurisdiction. For example, the General Allotment Act, after the passage of a trust period, provided that patent should issue and "then each and every

allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. § 349.

The General Allotment Act, as well as other allotment acts, had a dramatic impact not only on tribal land ownership patterns but also on tribal versus state jurisdiction. With respect to all fee lands within Indian reservations, this Court has stated the "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565. This Court has spelled out the limited nature of any remaining tribal jurisdiction over nonIndian land:

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States v. Wheeler*, 435 U.S. 313, 326, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978), the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *Montana*, 450 U.S. at 564.

South Dakota v. Bourland, 508 U.S. 679, 694-95 (1993). *See also Montana*, 450 U.S. at 560 (citing to *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977), and noting that neither the acts of Congress, under which tribal trust lands were alienated, nor any treaty language establishing a reservation gave the Puyallup Tribe regulatory authority over land owned by nonIndians).

The effect of the allotment acts was to expand state regulatory jurisdiction over most fee land owned by nonIndians. Although Congress became disenchanted with and ultimately repealed the allotment acts, those repeals did not reverse the

jurisdictional changes affected by the allotment acts. For that reason, this Court has never held that Congress ever reversed the state's assumption of regulatory jurisdiction over fee lands owned by nonIndians.

In recent years, this Court has also made it clear that while the Allotment Act expanded the potential of state jurisdiction over privately owned fee property within Indian country, such expansion was limited. Thus the Court has found that states lacked "plenary power" over Indians residing on reservation fee lands. For example, in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), this Court found that the State of Montana could not impose its cigarette sales and personal property taxes and certain licensing fees on *Indian* residents of a reservation. It noted that the Allotment Act did not itself establish "Montana's jurisdiction as to those Indians living on 'fee patented' lands." 425 U.S. at 478. Earlier, in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-58 (1962), this Court found that it was unreasonable to suggest that section 6 of the Allotment Act removed patented fee land from the reservations and thus denied the tribes of criminal jurisdiction over *Indian* defendants residing on fee lands. To hold otherwise, this Court noted, would require law enforcement officers to research the land ownership patterns every time a criminal offense occurs within reservation boundaries. *Id.*

But just because this Court noted in cases like *Moe* and *Seymour* that the states do not have plenary jurisdiction over fee lands within Indian reservations, and just because the fee land remains within Indian country, that does not mean that the presumption against tribal regulatory jurisdiction over nonIndian fee lands articulated in *Montana* lacks force. In fact, in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), this Court was confronted with the question of whether the county could

impose certain real estate taxes on fee lands within the Yakima Reservation. The tribe argued, citing *Moe*, that the Allotment Act had essentially been repealed and that any state assertion of jurisdiction over fee lands was unlawful. This Court disagreed. It acknowledged initially that section 6 of the Allotment Act did not give "*in personam* jurisdiction . . . to include *subsequent* Indian owners." *Id.* at 262. But when looking at the entirety of the Allotment Act, this Court concluded that because "Yakima County's assertion of jurisdiction over reservation fee-patented land. . . . is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* at 264-65. This Court therefore found that the county could impose certain taxes over all fee lands—owned by Indians and nonIndians alike.[2]

The end result of the allotment acts was to diminish tribal jurisdiction over certain nonIndian-owned fee lands. As this Court has made clear, because the intent of the allotment acts was to do away with the reservation system, it was only natural that the nonIndian owners of the allotments were to be under state, rather than tribal, jurisdiction.

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; *quoted in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (plurality opinion).

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[2] Interestingly, all the parties to the case agreed that the state could tax fee lands owned by nonmembers of the Tribe. 502 U.S. at 265 (tribe and amicus) "would allow state taxation of only those fee lands owned . . . by nonmembers of the Tribe."

In contrast to this strong presumption against finding tribal jurisdiction over fee simple property belonging to nonIndians, the Tenth Circuit chose to minimize the import of the land's status. *See, e.g.*, PA at 16a-19a, 25a. This cannot be reconciled with the opinions of this Court. Granting the petition for writ of certiorari is the only way to resolve this conflict.

B. The Decision Below Cannot Be Reconciled with the Opinions of the Ninth Circuit

1. Cases Like *Big Horn County Electric Cooperative v. Adams* Are Better Reasoned Than *Atkinson*

Ever since *Montana*, and despite the lessons of *Montana*, the Crow Tribe has attempted to extend its regulatory and taxing jurisdiction over nonIndian-owned lands. The most recent Ninth Circuit opinion on this issue, *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), and the case of Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, reflect this continuing difficulty.

In *Big Horn*, the Crow Tribe imposed an ad valorem tax on easements owned by an electric cooperative and the cooperative sued in federal district court. 219 F.3d at 948-49. Finding that the utility's easements were the functional equivalent of fee land, *id.* at 950, the court proceeded to find that the tribe had no taxing authority over the property. It rejected first the argument that there was a "consensual agreement" because the tax was imposed upon property, not actions arising out of consensual relationships. *Id.* at 951. The tribe also argued that tribal integrity would be threatened if it could not raise the revenues, which it needed to finance tribal services. The Ninth Circuit rejected this argument also, finding that it would swallow the rule of *Montana*. *Id.* at 951-52.

The Thompsons, who are not Indians, face a similar problem in their case, which is now pending before the Ninth

Circuit, Case No. 00-35805. They own a trading post on fee land upon which the tribe has imposed a 4% resort tax upon all gross receipts. In an order dated August 7, 2000, the Montana District Court struck down the tax because the tribe "does not have jurisdiction to tax transactions between non-Indians which occur entirely on non-Indian fee land." Order at 1-2. The emphasis upon the nature of the land ownership is an analysis that is more consistent with this Court's holdings than the holding of the Tenth Circuit in *Atkinson*.

Additionally, the district court in *Thompson* relied upon the reasoning in two other Montana Federal District Court challenges to the identical resort tax on the Crow Reservation, *in re Haines*, 245 B.R. 401 (D. Mont. 2000), *appeal pending sub nom. Crow Tribe v. Haines*, Ninth Circuit Case No. 00-35176, and *Rose v. Adams*, U.S. District Court Case No. 99-126, *appeal pending*.

If this Court were to resolve the outstanding issues in *Atkinson*, it would help clarify that the Ninth Circuit is on the right track with its decision in *Big Horn*. Furthermore, if this Court were to address the issues raised in *Atkinson*, then the Ninth Circuit would be able to better analyze the legality of the Crow resort tax at issue in *Thompson*, *Haines*, and *Rose*.

2. *Bugenig v. Hoopa Valley Tribe* Demonstrates a Proper Understanding of Tribal Jurisdiction

Amicus Mrs. Roberta Bugenig is a nonIndian whose ancestors migrated to the Hoopa Valley, California, area approximately 150 years ago. *Bugenig v. Hoopa Valley Tribe*, 2000 U.S. App. LEXIS 24746, at *4. In 1995, the tribe passed an ordinance establishing a buffer zone of one-half mile in every direction from the location of the White Deerskin Dance Trail. *Id.* Shortly after the establishment of the half-mile buffer zone around the dance trail site, Mrs. Bugenig purchased in fee simple 40 acres of land located within the reservation's external

boundaries and the buffer zone. *Id.* Mrs. Bugenig sought and obtained permission from the California Department of Forestry to remove second-growth trees from approximately three acres on her property in order to facilitate the building of a home. *Id.* at *5. After she began cutting trees, the tribe moved for an injunction in tribal court to prevent Mrs. Bugenig from harvesting her trees. *Id.* at *6.

After exhausting her tribal court remedies in a losing effort, Mrs. Bugenig sued in federal district court. The trial court ruled that based upon the Hoopa-Yurok Settlement Act, the tribe had jurisdiction over Mrs. Bugenig's fee simple property. *Id.* at *8.

The Ninth Circuit reversed. It found first that the terms of the Settlement Act did not reflect an intent of Congress to grant the tribe jurisdiction over fee property. *Id.* at *22. Secondly, it found on the basis of cases such as *Montana* and *Strate* that the relatively insignificant impacts of Mrs. Bugenig's activities on her land did not implicate the second *Montana* exception.[3] *Id.* at *23-*33. Tellingly, the court rejected the notion that an "aggregation" of impacts on fee simple property could justify tribal jurisdiction over fee property within a reservation. *Id.* at *29. In reaching this decision, the Ninth Circuit recognized the import of the nature of the underlying property:

> [A]n Indian tribe's claim of jurisdiction is significantly strengthened when the events at issue took place on land owned and controlled exclusively by tribal members. Conversely, when a tribe attempts to assert regulatory authority over land that is owned and controlled by a nonmember, it confronts a nearly impossible task.

Id. at *33.

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[3] The second *Montana* exception is that the activity would have an adverse impact of the ability of the tribe to govern itself.

This decision in *Bugenig*, to the extent that it involves an interpretation of the Hoopa-Yurok Settlement Act, does not, of course, implicate any conflict with the case below. Likewise, the facts of *Bugenig* (regulating a minor timber harvest) are uniquely different from those in *Atkinson* (taxing trading post transactions) and one cannot say how the Tenth Circuit would have ruled in *Bugenig* simply based on its holding in *Atkinson*. Nevertheless, the differing understandings of these two circuits toward basic principles of Indian law and this Court's precedents regarding the importance of the fee simple status of property, point out a need for this Court to once again step in and provide needed guidance to the Tenth Circuit.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2000.

Respectfully submitted,

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae